



ATTORNEY GENERAL OF TEXAS
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February 14, 2005

Ms. Anne M. Constantine
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OR2005-01349

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 218618.

The Dallas-Fort Worth International Airport Board (the "board") received three requests from three requestors for information relating to the bid proposals for the Duty Free Concession at Dallas-Fort Worth International Airport. You claim that the requested score sheets and other documents relating to the bid proposal are excepted from disclosure under section 552.104 of the Government Code. Although you take no position with respect to the requested bid proposals, you claim that this information may contain proprietary information subject to exception under the Public Information Act (the "Act"). Pursuant to section 552.305(d) of the Government Code, the board notified the interested third parties, The Nuance Company ("Nuance"), DFW Duty Free Partners ("DFW Duty Free"), and Buckaroo Duty Free Joint Venture ("Buckaroo"), of the board's receipt of the requests and of their right to submit arguments to us as to why any portion of their bid proposals should not be released. *See Gov't Code §552.305(d); see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered arguments received from the board, Buckaroo, and Nuance, and have reviewed the submitted information.

We first address the board's arguments for withholding the submitted score sheets and documents relating to the bid proposals under section 552.104 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). The board informs us that the requests for bids for the Duty Free Concession remains "an open procurement matter" and that the board has not executed a contract with the winning bidder. Based on your assertion that a final contract has not been awarded and our review of the submitted information, we conclude that the board may withhold all of the submitted score sheets and most of the other documents relating to the bid proposals under section 552.104 of the Government Code. We do not find, however, that the board has shown that release of some of the submitted information would give an advantage to a competitor or bidder. Further, the board may not withhold information that has already been released. See Gov't Code § 552.007. We have marked the information that may be withheld under section 552.104.¹

Buckaroo argues that portions of its information are excepted under subsections 552.110(a) and 552.110(b) of the Government Code. Nuance argues that portions of its proposal are excepted under section 552.110(b) of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(a)-(b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It

¹It is implicit in several provisions of the Act that chapter 552 of the Government Code applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. We note that some of the information that the board asserts is excepted under section 552.104 is not responsive to the instant requests. Therefore, this ruling does not address that information. See also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Based upon our review of the arguments submitted by Buckaroo and the information at issue, we conclude that Buckaroo has established a *prima facie* claim that its client and vendor references qualify as a trade secret under section 552.110(a). However, Buckaroo has neither shown that any of the remaining information in its proposal that it seeks to withhold meets the definition of a trade secret nor demonstrated the necessary factors to establish a trade secret claim for this information. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business"); *see also* Open Records Decision Nos. 552 at 5-6 (1990), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications,

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

and experience). Thus, we are unable to conclude that section 552.110(a) applies to any of the remaining information that Buckaroo seeks to withhold.

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This section requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After carefully reviewing the information at issue and the arguments presented to us by Buckaroo and Nuance, we determine that both companies have established that portions of their information are excepted under section 552.110(b). Thus, section 552.110(b) requires that the board withhold the information we have marked as excepted from disclosure.

The submitted information also contains e-mail addresses obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential.³ You do not inform us that the individuals to whom these e-mail addresses belong have affirmatively consented to the release of their e-mail addresses contained in the submitted materials. The board must, therefore, withhold e-mail addresses of members of the public under section 552.137. We note that section 552.137 does not apply to a government employee’s work e-mail address or a business’s general e-mail address or web address.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). Because DFW Duty Free did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that this company’s information is excepted from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The company’s proposal must therefore be released to the requestor.

In summary, the board may withhold the information we have marked as excepted under section 552.104 of the Government Code. The board must withhold the marked portions of

³The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Nuance's proposal under section 552.110(b). We have marked the information in Buckaroo's proposal that must be withheld under subsections 552.110(a) and 552.110(b) of the Government Code. The e-mail addresses of members of the public must be withheld under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 218618

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